92-791

No. _____

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

RONALD HENRY ZAHARIA, TERRY LEE MITTELSTAEDT and all those similarly situated,

Petitioners,
vs.

THE MUNICIPAL COURT, CITY OF AURORA, COLORADO, THE HONORABLE JOHN L. SPRINGER, one of its judges, and the CITY OF AURORA, COLORADO, a Colorado Municipal Corporation organized as a Home Rule Municipality under Article XX of the Colorado Constitution,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

WHITE, PICKARD & HERREN

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QUESTIONS PRESENTED FOR REVIEW

Does a municipality that commands the arrest, pre-trial detention pending the posting of bond, and trial upon pain of fine and imprisonment by a tribunal acting without subject matter jurisdiction, commit violations rising to the level of constitutional dignity required for 42 U.S.C. § 1983 liability?

PARTIES BELOW

Petitioners, RONALD HENRY ZAHARIA, TERRY LEE MITTELSTAEDT, as individuals were plaintiff-appellants before the Tenth Circuit Court of Appeals, along with all persons similarly situated, although class certification had been deferred by the United States District Court for the District of Colorado.

Respondents THE MUNICIPAL COURT, CITY OF AURORA, COLORADO, THE HONORABLE JOHN L. SPRINGER, one of its judges, and the CITY OF AURORA, COLORADO were defendant-appellees before the Tenth Circuit Court of Appeals, although THE MUNICIPAL COURT, CITY OF AURORA, COLORADO and THE HONORABLE JOHN L. SPRINGER have disclaimed any interest in defending the subject lawsuit and stipulated that they would follow any ruling of the Courts of the Untied States.

TABLE OF CONTENTS

Questions Presented for Review i

Parties Below ii

Table of Contents iii

Table of Authorities v

Table of Cases v

Table of United States Constitutional Authority vi

Table of Statutes vi

Table of Municipal Ordinances vi

Jurisdictional Statement 2

Constitutional and Statutory Provisions involved in this Matter 2

Basis of Federal Jurisdiction for the Court of Appeals for the Tenth Circuit 3

Statement of Facts 4

Reasons for Granting Writ 7

A. Fundamental fairness and due process require that a person not be twice placed in jeopardy on the same criminal charge. 9

B. The fact of acquittal in a court lacking subject matter jurisdiction cannot change the character of the deprivation of due process. 10

Conclusion 13

Appendix

Memorandum Opinion And Order 1a

Judgment 14a

Order And Judgment On Appeal 16a

Order Denying Petition For Rehearing 18a

Table of Authorities

Table of Cases

Benton v. Maryland,
395 U.S. 784, 23 L.Ed.2d 707, 89 S.Ct. 2056 (1969) 9, 10

Board of Regents v. Roth,
408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972) 11

Boyd v. United States,
116 U.S. 616, 29 L.Ed. 746, 6 S.Ct 524 (1886) 13

Daniel v. Warden, State Correction Institution,
794 F.2d 880 (3rd Cir. 1986) 8

Daniels v. Williams,
474 U.S. 327, 88 L.Ed.2d 662, 106 S.Ct. 662 (1986) 11, 12

Duncan v. Louisiana,
391 U.S. 145, 20 L.Ed.2d 491, 88 S.Ct. 1444 (1968) 9

Grafton v. United States,
206 U.S. 333, 27 S.Ct. 749, 51 L.Ed. 1084 (1907) 8

Green v. United States,
355 U.S. 184, 2 L.Ed.2d 199, 78 S.Ct. 221, 61 ALR2d 1119 (1957) 9

Ingrahm v. Wright,
430 U.S. 651, 51 L.Ed.2d 711, 97 S.Ct. 1401 (1977) 11

Kinsella v. United States,
361 U.S. 234, 4 L.Ed.2d 268, 80 S.Ct. 297 (1960) 12

Meachum v. Fano,
427 U.S. at 224, 49 L.Ed.2d 451, 96 S.Ct. 2532 (1976) 11

Palko v. Connecticut,
302 U.S. 319, 82 L.Ed.2d 288, 58 S.Ct. 149 (1937) 9

Powell v. Alabama,
287 U.S. 45, 77 L.Ed. 158 (1932) 7, 8, 13

Reid v. Covert,
354 U.S. 1, 1 L.Ed.2d 1458, 77 S.Ct. 1222 (1957) 13

Stephens v. Zant,
631 F.2d 397 (5th Cir. 1980) 8

United States v. Ball,
163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1986) 8

Table of United States Constitutional Authority

Fifth Amendment 3

Fourteenth Amendment 2

Fourth Amendment 3

Table of Statutes

28 U.S.C. § 1254 2

28 U.S.C. § 1291 3

42 U.S.C. § 1983 2, 11, 12

Table of Municipal Ordinances

Section 27-113(a), CITY CODE, CITY OF AURORA 5

Section 27-37, CCITY CODE, CITY OF AURORA 4, 5

Section 27-38, CCITY CODE, CITY OF AURORA 4, 5

Section 27-39, CITY CODE, CITY OF AURORA 4

Section 27-40, CITY CODE, CITY OF AURORA 5

Section 27-89(1), CITY CODE, CITY OF AURORA 5

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners, RONALD HENRY ZAHARIA, TERRY LEE MITTELSTAEDT, as individuals, and on behalf of all individuals similarily situated, pray this Honorable Court grant Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit to review its holding of March 19, 1992, upholding the United States District Court for the District of

Colorado's July 17, 1990, Memorandum Opinion and Order whilch held that subject matter jurisdiction is not an essential element of due process of law.

JURISDICTIONAL STATEMENT

A Memorandum Opinion and Order entered in the district court case on July 17, 1990 (Appendix, p. 1a). Judgment was entered upon the Memorandum Opinion and Order on July 18, 1990 (Appendix, p. 14a). Appeal was taken and denied by the United States Court of Appeals for the Tenth Circuit in a judgment filed March 5, 1992 (Appendix, p. 16a). A Petition for Re-hearing with a suggestion for rehearing en banc was filed on March 19, 1992. The Petition was denied on July 1, 1992 (Appendix, p. 18a). Jurisdiction is conferred to this Court pursuant to 28 U.S.C. § 1254 in that this Court has jurisdiction to review decisions of the United States Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS MATTER

Title 42 United States Code § 1983 holds,
Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

Section 1 of the Fourteenth Amendment to the Constitution of the Untied States; provides,

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are

> citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: or shall any State deprive any person of life. liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fourth Amendment to the Constitution of the Untied States provides,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the Constitution of the Untied States states,

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

BASIS OF FEDERAL JURISDICTION FOR THE COURT OF APPEALS FOR THE TENTH CIRCUIT

The Court of Appeals had jurisdiction over this matter pursuant to 28 U.S.C. § 1291 in that it has jurisdiction of

appeals from all final decisions of the District Court for the District of Colorado.

STATEMENT OF FACTS

On April 18, 1986, the UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (Kane, J.) held that §§ 27-37 and 27-38, CITY CODE OF THE CITY OF AURORA, were **void** and unenforceable in that the penalty provision of said ordinances exceeded the delegation of authority to municipalities.[1]. Notwithstanding a final order of the United States District Court for the District of Colorado finding the ordinances in question unenforceable, Respondents still attempted to exercise jurisdiction over persons brought before them under said ordinances, arresting them and requiring that they post bond and defend themselves at trial on charges that cannot lawfully result in punitive sanction.

Petitioner ZAHARIA was a defendant before the AURORA MUNICIPAL COURT on Summons number R-39944, having been arrested, held until bond was posted, and charged with violating Sections 27-37, 27-38, and 27-39, CITY CODE OF THE CITY OF AURORA, Assault, Battery, and Reckless endangerment, respectively. The charge of Reckless endangerment appeared to have been based upon an allegation that Petitioner ZAHARIA held a knife to a woman's throat and told her that if she were to move he would kill her. The only evidence presented at trial on this issue was a knife and hearsay statements; the alleged victim invoked her rights under the Fifth Amendment not to testify.

Petitioner ZAHARIA challenged the jurisdiction of the AURORA MUNICIPAL COURT over the subject matter of

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1 *Aurora v. Green*, 86-CR-20 (D.Colo. 1986). Not included in materials submitted with this Petition as neither the finding nor the effect are in dispute. The case is summarized by the district court at page 11 of the Appendix.

Summons and Complaint R-39944, and his MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION was set for determination by a three judge panel of the Aurora Municipal Court. After the CITY OF AURORA failed to submit its brief for consideration on that matter, on the morning the case was scheduled for oral argument before the three judge panel, November 21, 1989, the CITY OF AURORA moved to amend to dismiss all the original charges against Petitioner ZAHARIA and substitute charges of Sections 27-40, 27-113(a); and 27-89(1), CITY CODE, CITY OF AURORA (False Imprisonment, Unlawful display and Disorderly Conduct, respectively). Oral argument was stricken and the Court, having permitted, over objection, amendment of the Complaint by addition of those charges and dismissal of all the original charges, found the issues of its subject matter jurisdiction moot. This notwithstanding the objection that if it lacked subject matter jurisdiction over all matters charged, it was without jurisdiction to permit amendment of the Complaint. Petitioner ZAHARIA was acquitted following jury trial before the Respondent AURORA MUNICIPAL COURT on February 1, 1990, and is thus without an avenue under the state law to vindicate his rights with respect to two of the three ordinances.

Petitioner TERRY LEE MITTELSTAEDT was a defendant before the AURORA MUNICIPAL COURT on Summons number R-44013, having been arrested, held until bond was posted, and charged with violating Sections 27-37, and 27-38, CITY CODE OF THE CITY OF AURORA, Assault and Battery. Petitioner MITTELSTAEDT was set for trial to jury on February 26, 1990. This action originally sought to restrain the Respondents from trying Petitioner MITTELSTAEDT and the Court had set the matter for hearing on Petitioners' MOTION FOR TEMPORARY RESTRAINING ORDER on February 26, 1990. Prior to the scheduled hearing on the temporary restraining order, it became apparent that

the CITY OF AURORA was unable to locate any witnesses who would testify to having observed any conduct that would constitute a violation of the ordinances charged. Believing that the CITY OF AURORA would move to dismiss the municipal prosecution, Petitioner MITTELSTAEDT withdrew the MOTION FOR TEMPORARY RESTRAINING ORDER. Following a day and one half trial, in which the CITY OF AURORA called no perceiving witnesses to either of the alleged violations, Petitioner MITTELSTAEDT was acquitted. Petitioner MITTELSTAEDT was forced to defend against charges that appear to be outside the subject matter jurisdiction of the court that tried him and is left, because of his acquittal, with no state law recourse to redress that violation of due process.

Petitioners brought suit in the United States District Court for the District of Colorado for damages and injunctive relief[2]; In so doing, Petitioner Zaharia also challenged a previous conviction for battery by the Aurora Municipal Court, which conviction was on appeal at the time.[3] In dismissing the Complaint herein the district court ruled:

> Even if the Aurora Court lacked subject matter jurisdiction because the municipal ordinances under which Zaharia and Mittelstaedt were prosecuted were pre-empted under state law — an issue this court need not and does not decide — Plaintiffs have not demonstrated that past prosecutions under the Ordinances that resulted in acquittal are actionable under section 1983 as violations of the Fourth and Fourteenth Amendments to the federal constitution.

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2 Class certification was deferred until determination of the underlying legal issues with respect to liability.

3 The United States District Court for the District of Colorado found that *Younger v. Harris*, 401 U.S. 37 (1971) abstention was appropriate. Petitioners do no challenge this findings as to the then pending matter; however, Zaharia has since been denied relief by the Colorado courts.

They rely upon a passage in *Powell v. Alabama*, 287 U.S. 45, 68 (1932):

> It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirements of due process of law.

Plaintiffs admit and the court agrees that this language was *dicta*. The sole issue before the court in *Powell* was whether the trial court's failure to appoint counsel deprived appellants of due process and equal protection under the Fourteenth Amendment. Plaintiffs have not cited — and the court has not found — authority to support their position in this case. I conclude that such past prosecutions, even if based upon municipal ordinances that are pre-empted by state law, do not rise to the level of constitutional dignity required for a section 1983 liability.

(Appendix, pp. 11a-12a)

Appeal followed to the Tenth Circuit Court of Appeals where the case was briefed and argued. The Tenth Circuit affirmed the district court without comment on the merits, (Appendix, pp. 16a-17a), indicating only that they were "not persuaded that the district court erred in granting summary judgment for the City." (Appendix, p. 17a).

REASONS FOR GRANTING WRIT

When this Court noted in *Powell v. Alabama*, 287 U.S. 45, 68 (1932) that it had never been doubted that subject matter jurisdiction was basic to due process of law, that pronouncement was a statement of well-established constitutional law, presenting the reasoning underlying this

Court's reasoning in a myriad of cases. The United States District Courts are not free to ignore, without reasoned authority, the statements of this Court as to the basic underpinnings of United States Constitutional law. The United States Circuit Court of Appeal for the Tenth Circuit has let stand, without comment, a decision of the United States District Court for the District of Colorado that openly defies this Court's pronouncements of basic due process of law. This constitutes a departure by the district court and the Tenth Circuit from the law as announced by this Court.

It is submitted that in finding that the passage from *Powell v. Alabama, supra*, was *dicta*, the district court ignored the argument that the principles so enunciated have been so firmly rooted in American jurisprudence as to form the unstated underpinning of numerous legal concepts for the past two hundred years. Indeed, the protection of former jeopardy, guaranteed by the Fourth, Fifth and Fourteenth Amendments to the United States Constitution, depends upon the tribunal having subject matter jurisdiction.

> Under established law, individuals are not put in jeopardy unless the court that tried them the first time **had jurisdiction to try them for the charges** they later seek to avoid. *See Grafton v. United States*, 206 U.S. 333, 345, 27 S.Ct. 749, 751, 51 L.Ed. 1084 (1907); *United States v. Ball*, 163 U.S. 662, 669, 16 S.Ct. 1192, 1194, 41 L.Ed. 300 (1986). In determining whether the [state court] had jurisdiction over [the charges], we must look to state law. *Stephens v. Zant*, 631 F.2d 397 (5th Cir. 1980), *reversed on other grounds*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

Daniel v. Warden, State Correction Institution, 794 F.2d 880 (3rd Cir. 1986). Emphasis added. Clearly, if the AURORA MUNICIPAL COURT had no subject matter jurisdiction over the charges upon which it compelled the Petitioners to

defend, their acquittal by that tribunal does nothing to lessen the encroachment on the Bill of Rights and other safeguards in the Constitution. **If probable cause ever existed to charge them with offenses against the peace and dignity of the People of the State of Colorado, then the properly constituted state authority may still commence a prosecution in the state district courts against these Petitioners. Such a prosecution could even make use of their sworn testimony before the AURORA MUNICIPAL COURT.**

A. Fundamental fairness and due process require that a person not be twice placed in jeopardy on the same criminal charge.

In *Benton v. Maryland*, 395 U.S. 784, 23 L.Ed.2d 707, 89 S.Ct. 2056 (1969) this Court was called upon to decide the question "Is the double jeopardy clause of the Fifth Amendment applicable to the States through the Fourteenth Amendment?" *Benton v. Maryland*, 395 U.S. 784, 786, 23 L.Ed.2d 707, 711, 89 S.Ct. 2056 (1969).

> Our recent cases have thoroughly rejected the *Palko v. Connecticut*, 302 U.S. 319, 82 L.Ed.2d 288, 58 S.Ct. 149 [(1937)] notion that basic constitutional rights can be denied by the States as long as the totality of the circumstances does not disclose a denial of "fundamental fairness." Once it is decided that a particular Bill of Rights guarantee is "fundamental to the American scheme of justice," *Duncan v. Louisiana*, [391 U.S. 145, 149, 20 L.Ed.2d 491, 496, 88 S.Ct. 1444 (1968)] the same constitutional standards apply against both the State and Federal Governments.
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> ***
>
> As this Court put it in *Green v. United States*, 355 U.S. 184, 187-188, 2 L.Ed.2d 199, 204, 78 S.Ct. 221, 61 ALR2d 1119 (1957), "[t]he underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State

> with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to the embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." This underlying notion has from the very beginning been part of our constitutional tradition. Like the right to trial by jury it is clearly "fundamental to the American scheme of justice."

Benton v. Maryland, 395 U.S. 784, 795-796, 23 L.Ed.2d 707, 717, 89 S.Ct. 2056 (1969). In deciding that the guarantee of double jeopardy is "fundamental to the American scheme of justice" this Court clearly was addressing the right of one accused by the State to have his guilt or innocence finally determined by a competent tribunal. Here it is clear that the finding of not guilty by the AURORA MUNICIPAL COURT has no binding effect should a Colorado district attorney file charges in a court of competent jurisdiction; subjecting the Petitioners to the very evil this Court indicated the Anglo-American legal tradition has so long sought to avoid.

B. The fact of acquittal in a court lacking subject matter jurisdiction cannot change the character of the deprivation of due process.

Where the district court finds the fact of acquittals to somehow lessen the constitutional magnitude of the violation, it is submitted that if anything they increase it. Here, innocent men were forced to defend themselves, on pain of fines and imprisonment,[4] and having successfully defended themselves before one forum, could face essentially the same

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[4] And others continue to be subjected to arrest, pre-trial detention pending the posting of bond, and trial upon pain of fine and imprisonment by a tribunal acting without subject matter jurisdiction.

charges before a second forum, both claiming standing to try the Petitioners under the Constitution of the State of Colorado. But it is not the fact of acquittal or conviction which establishes the constitutional magnitude, it is the fact of being compelled, upon pain of loss of liberty and property, to answer before a court which lacks jurisdiction to hold Petitioners to account.

> "[T]he range of interests protected by procedural due process is not infinite." *Board of Regents v. Roth*, [408 U.S. 564 at 570, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972)]. We have repeatedly rejected "the notion that *any* grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause." *Meachum v. Fano*, 427 U.S. at 224, 49 L.Ed.2d 451, 96 S.Ct. 2532 (1976) Due process is required only where a decision of the State implicates an interest within the protection of the Fourteenth Amendment. And "to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake." *Roth*, , at 570-571, 33 L.Ed.2d 548, 92 S.Ct. 2701.

Ingrahm v. Wright, 430 U.S. 651 at 672, 51 L.Ed.2d 711 at 731, 97 S.Ct. 1401 (1977). There is no question that the penal depravation of liberty or property is an area within the protection of the Fourteenth Amendment; the *nature* of the interest therefore established that the violation is one of constitutional dimension.

In his concurring opinion in *Daniels v. Williams*, 474 U.S. 327, 88 L.Ed.2d 662, 106 S.Ct. 662 (1986) Justice Stevens reasoned:

> Thus, even though the State may have every right to deprive a person of his property or his liberty, the individual may nevertheless be able to allege a valid § 1983 due process claim, perhaps because a predeprivation hearing must be held, or because the

> state procedure itself is fundamentally flawed. So too, even thought a deprivation may be unauthorized, a procedural due process claim may be raised if it challenges the State's procedures for preventing or redressing the deprivation. However, a complaint does not state a valid procedural due process objection — and a valid § 1983 claim — if it does not include a challenge to the fundamental fairness of the State's procedures.

Daniels v. Williams, 474 U.S. 327, 339, 88 L.Ed.2d 662, 673, 106 S.Ct. 662 (1986). Accordingly, it is submitted that the allegations of the Complaint, establishing that the prosecutions were outside of the subject matter jurisdiction of the AURORA MUNICIPAL COURT and that liberty and property interests of the Petitioners were implicated, were sufficient to plead a violation of due process in that the fundamental fairness of the procedure is challenged.

In holding that a military court-martial did not have subject matter jurisdiction to try civilian dependents of military personnel stationed overseas[5], this Court stated:

> It is urged that the expansion of military jurisdiction over civilians claimed here is only slight, and that the practical necessity for it is very great" The attitude appears to be that a slight encroachment on the Bill of Rights and other safeguards in the Constitution need cause little concern. But to hold that these wives could be tried by the military would be a tempting precedent. Slight encroachments create new boundaries from which legions of power can seek new territories to capture. "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of

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5 Originally limited to capital cases, but extended in 1960 to all cases by *Kinsella v. United States*, 361 U.S. 234, 4 L.Ed.2d 268, 80 S.Ct. 297 (1960) and its companion cases.

> procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." [*Boyd v. United States*, 116 U.S. 616, 635, 29 L.Ed. 746, 6 S.Ct 524 (1886)].

Reid v. Covert, 354 U.S. 1, 39-40, 1 L.Ed.2d 1458, 1176, 77 S.Ct. 1222 (1957).

CONCLUSION

If there is no deprivation which rises to the level of constitutional dignity required for a section 1983 liability where a municipality commands the arrest, pre-trial detention pending the posting of bond, and trial upon pain of fine and imprisonment of individuals by a tribunal acting without subject matter jurisdiction, the surely the Constitution of the Untied States has suffered that "[s]light encroachment [creating] new boundaries from which legions of power can seek new territories to capture." *Reid v. Covert*, 354 U.S. 1, 39, 1 L.Ed.2d 1458, 1176, 77 S.Ct. 1222 (1957).

The writ should be granted to affirm what had never before been doubted: "that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, **together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirements of due process of law.** *Powell v. Alabama*, 287 U.S. 45, 68 (1932). Emphasis added.

Dated as aamended in Denver, Colorado, October 20, 1992.

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

APPENDIX

WHITE, PICKARD & HERREN

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. **90-A-277**

RONALD HENRY ZAHARIA, TERRY LEE MITTELSTAEDT, and all those similarly situated.

Plaintiffs,

v.

THE MUNICIPAL COURT, CITY OF AURORA, COLORADO, THE HONORABLE JOHN L. SPRINGER, one of its judges, and THE CITY OF AURORA, COLORADO, a Colorado Municipal Corporation organized as a Home Rule Municipality under Article XX of the Colorado Constitution,

Defendants.

MEMORANDUM OPINION AND ORDER

ARRAJ, District Judge

This matter is before the court on the Cross-Motions of Defendant City of Aurora ("Aurora") and Plaintiffs Ronald H. Zaharia ("Zaharia") and Terry L. Mittelstaedt ("Mittelstaedt") for Summary Judgment under Rules 56(a), (b), Fed. R. Civ. P., and on Aurora's Motion for Attorney Fees under Rule 11, Fed. R. Civ. P. This court has jurisdiction under 28 U.S.C. §§ 1331, 1343(a), 2201(a), 2202 (1988). On April 12, 1990, the court heard oral arguments on the motion for attorney fees and reserved its ruling. On April 27, 1990, the court heard oral argument on the cross-motions for summary judgment. After reviewing these arguments, briefs and other materials submitted by counsel, the court is now prepared to rule on each of these matters.

BACKGROUND

The material facts of this case are undisputed. Aurora is a home-rule municipality. Plaintiff Zaharia was a defendant before the Municipal Court, City of Aurora, Colorado ("Aurora Court"). He was arrested and, under summons number R-39570, was charged and convicted of violating section 27-39 (assault) of the City Code of the City of Aurora ("Code"); he has appealed this conviction. In addition, he was arrested and, under summons number R-39944, was charged with violations of Code sections 27-37 (assault), 27-38 (battery) and 27-39 (reckless endangerment).[6] Over Zaharia's objection to the Aurora

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[6]Code section 27-37 provides:

> An assault is an unlawful and intentional attempt coupled with a present ability to commit a battery as defined in section 27-38 upon the person of another, and it shall be unlawful for any person to commit an assault in the city. Any person who shall be convicted of, or plead guilty or no contest to, a violation of this section shall, for each such offense, be fined in a sum not more than nine hundred ninety-nine dollars ($999.00) or imprisoned not to exceed one hundred eighty days, or both such fine and imprisonment.

Code section 27-38 provides:

> Battery is the unprivileged and intentional use of force or violence upon the person of another. Every battery shall be deemed to include a violation of assault as defined in section 27-37. It shall be unlawful to commit a battery in the city. Any person who shall be convicted of, or plead guilty or no contest to, a violation of this section shall, for each such offense, be fined in a sum not more than nine hundred ninety-nine dollars ($999.00) or imprisoned not to exceed one hundred eighty days, or both such fine and imprisonment.

Code section 27-39 provides:

> It shall be unlawful to recklessly engage in conduct which creates a substantial risk of serious bodily injury to

Court's exercise of subject matter jurisdiction, the complaint was amended by the addition of three charges (false imprisonment, disorderly conduct and unlawful display), and the original charges were dismissed. Following a jury trial on February 1, 1990, Zaharia was acquitted.

Plaintiff Mittelstaedt also was a defendant in the Aurora Court. He was arrested and, under summons number R-44013, was charged with assault and battery under Code sections 27-37 and 27-38, respectively. Following a jury trial, Mittelstaedt was acquitted on or about February 27, 1990.

On February 16, 1990, Plaintiffs filed this class action lawsuit pursuant to 42 U.S.C. § 1983, claiming that because the Code sections 27-37, 27-38 and 27-39 ("the Ordinances") are pre-empted by state law, Plaintiffs were and/or are being prosecuted under them in a court that lacks subject matter jurisdiction. They assert that this constitutes a denial of due process in violation of the Fourth and Fourteenth Amendments to the federal constitution and seek an order from this court:

> voiding the actions against them under such void ordinances, permanently restraining the AURORA Defendants from attempting to enforce said void ordinances, for their attorney fees pursuant to 42 U.S.C. 5 1988, and, as against the CITY OF AURORA only, for damages to be determined by the

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> another person. Any person who shall be convicted of, or plead guilty or no contest to, a violation of this section shall, for each such offense, be fined a sum not more than nine hundred ninety-nine dollars ($999.00) or imprisoned not to exceed one hundred eighty days, or both such fine and imprisonment.

Quoted in Complaint ¶ 8. The parties did not submit copies of the Ordinances, but the language quoted in the Complaint is undisputed. Answer ¶ 6.

> trier of fact, as compensation of liberty lost, time spent and monies expended in [sic] in connection with defending against a prosecution over which the subject court had no subject matter jurisdiction, said prosecution amounting to a taking without due process of law and a denial of equal protection under the law.

Alternatively, they request that the court certify to the Colorado Supreme Court the question whether the Ordinances are pre-empted by state law if it concludes that the law is not clearly established. Under Rules 23(b)(2), (3), Fed. R. Civ. P., Zaharia and Mittelstaedt seek to represent a class that "consists of all persons who within the two years prior to the filing of this Complaint were or are charged with, serving sentences upon a conviction of, or appearing before the Defendant Courts on charges of violating [Code] sections 27-37, 27-38 and 27-39. . . ." Complaint ¶¶ 6-7. On March 29, 1990, on oral stipulation of counsel, this court granted Plaintiffs' motion to defer certification of the class under Rule 23(c), Fed. R. Civ. P., until further order of the court.

On April 12, 1990, counsel to Zaharia, Mittelstaedt, Aurora and the Aurora Court, as well as Defendant Hon. John L. Springer ("Springer") and Hon. Richard Kaufman, the Presiding Judge of the Aurora Court, filed a stipulation, which provides:

> 1. The Plaintiffs and Defendants THE MUNICIPAL COURT, CITY OF AURORA, COLORADO and THE HONORABLE JOHN L. SPRINGER agree that said Defendants will be and are hereby relieved from any obligation to actively participate in the within action, including, but not limited to, being relieved from the obligation of filing an answer to the complaint; that such failure to actively participate in the case shall not affect the ultimate determination of the issues raised nor the relief sought by the complaint; and that said

Defendants will be bound by the orders of this Court, including orders for injunctive relief.

2. With the exception of any action taken to enforce any future order of the Court, Plaintiffs release Defendants THE MUNICIPAL COURT, CITY OF AURORA, COLORADO and THE HONORABLE JOHN L. SPRINGER from any claims they now have or may acquire in the future pursuant to 42 U.S.C. § 1988, including claims for attorney fees, and agree to indemnify and hold harmless said Defendants from any claim of contribution by any other defendant herein on any claim pursuant to 42 U.S.C. § 1988, including claims for attorney fees, raised within this action.

3. Defendants THE MUNICIPAL COURT, CITY OF AURORA, COLORADO and THE HONORABLE JOHN L. SPRINGER release and indemnify and agree to hold harmless Plaintiffs and their Counsel from any claims said Defendants may have in connection with the commencement of this action and the inclusion of said Defendants as parties before this Honorable Court.

April 12, 1990 Stipulation ¶¶ 1-3. By order dated April 12, 1990, the court granted this stipulation.

DISCUSSION

A. YOUNGER ABSTENTION

Before discussing the merits of Plaintiffs' claims, the court most address Aurora's assertion that this court should abstain under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). Plaintiffs essentially claim that the doctrine of abstention is inappropriate because the principles of comity and federalism underlying it do not apply to the decisions of municipal courts and that they do not have to exhaust state remedies to bring their section 1983 claim.

To the extent that Zaharia seeks a declaration that his battery conviction -- now on appeal -- is void, this court is obliged to abstain from passing on the merits of it under the *Younger* doctrine. In *Younger*, the Supreme Court held that absent prosecutorial bad faith, harassment or other unusual circumstance, a federal court cannot enjoin a state criminal prosecution on the ground that the statute on which the prosecution is based is unconstitutional. *See, Younger, supra,* 401 U.S. at 54. The Court based its holding on two general rationales. The first was the "basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Id.* at 43-44. The second was:

> an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Id. at 44. This policy of federal restraint "is founded on the premise that ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights." *Kugler v. Helfant*, 421 U.S. 117, 124 (1975).

Although Zaharia does not seek to enjoin prosecution in the trial court, the principles of *Younger* still apply. In *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), the Supreme Court addressed the question whether a federal court should abstain from hearing the merits of petitioner's section 1983 action which sought injunctive and declaratory relief following a state trial court judgment of liability under an

allegedly unconstitutional "quasi-criminal" nuisance statute. The Court held that a federal court should abstain in such a situation. It explained:

> Virtually all of the evils at which *Younger* is directed would inhere in federal intervention prior to completion of state appellate proceedings, just as surely as they would if such intervention occurred at or before trial. Intervention at the later stage is if anything more highly duplicative, since an entire trial has already taken place, and it is also a direct aspersion on the capabilities and good faith of state appellate courts. Nor, in these state-initiated nuisance proceedings, is federal intervention at the appellate stage any the less a disruption of the State's efforts to protect interests which it deems important. Indeed, it is likely to be even more disruptive and offensive because the State has already won a *nisi prius* determination that its valid policies are being violated in a fashion which justifies judicial abatement.
>
> Federal post-trial intervention, in a fashion designed to annul the results of a state trial, also deprives the States of a function which quite legitimately is left to them, that of overseeing trial court dispositions of constitutional issues which arise in civil litigation over which they have no jurisdiction. We think this consideration to be of some importance because it is typically a judicial system's appellate courts which are by their nature a litigant's most appropriate forum for the resolution of constitutional contentions- Especially is this true when, as here, the constitutional issue involves a statute which is capable of judicial narrowing. In short, we do not believe that a State's judicial system would be fairly accorded the opportunity to resolve federal issues arising in its courts if a federal district court were permitted to substitute itself for the State's appellate courts. We therefore hold that *Younger* standards must be met to justify federal intervention in a state judicial proceeding as to which a losing litigant has not exhausted his state appellate remedies.

Id. at 608-09 (1975) (footnotes omitted and emphasis added). *See also* 17A C. Wright, A. Miller & E. Cooper, FED. PRACTICE & PROCEDURE, § 4253, at 231 (1988) ("If a state proceeding was pending at a time that invokes the Younger rules, those rules remain applicable through the completion of all state appellate remedies."). Municipal courts are part of the state court system and interference with appeals from their decisions implicates the same concerns that interference with appeals from state court decisions does. I conclude, therefore, that the principles enunciated in *Huffman* apply to appeals of criminal convictions rendered in municipal courts just as surely as they apply to appeals of "quasi-criminal" judgments rendered in state civil courts. Thus, Plaintiffs' first argument against abstention is without merit.

As to Plaintiffs' second argument, it is well-settled that in a section 1983 action brought in federal court, "the federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Monroe v. Pape*, 365 U.S. 167, 183 (1961). *See, Spence v. Latting*, 512 F.2d 93, 98 (10th Cir.), *cert. denied*, 423 U.S. 896 (1975). In *Huffman*, however, the Court addressed the question whether this holding undercut its prior holding in *Monroe*:

> By requiring exhaustion of state appellate remedies for the purposes of applying *Younger*, we in no way undermine *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed.2d 492 (1961). There we held that one seeking redress under 42 U.S.C. § 1983 for a deprivation of federal rights need not first initiate state proceedings based on related state causes of action. 365 U.S., at 183, 81 S.Ct., at 482. <u>*Monroe v. Pape* had nothing to do with the problem presently before us, that of the deference to be accorded state proceedings which have already been initiated and which afford a competent tribunal for the resolution of federal issues.</u>

420 U.S. at 609 n. 21 (emphasis added). Since the issue before me is similar to that which was before the Court in *Huffman*, abstention is proper in this case. Plaintiffs' second argument against abstention is therefore without merit.

None of the exceptions to the application of the *Younger* doctrine apply here. *See, Younger, supra*, 401 U.S. at 54. Consequently, this court must abstain from passing upon that portion of Plaintiff Zaharia's claim which seeks to invalidate his battery conviction now on appeal.[7]

B. MERITS OF THE REMAINING PORTION OF ZAHARIA'S AND MITTELSTAEDT'S CLAIM

Plaintiffs and Defendant Aurora assert that they are entitled to judgment under the law as to the remaining parts of Plaintiffs' claim under 42 U.S.C. § 1983 (1982).[8] To prevail on his claims, a plaintiff must prove two elements, first, that some person has deprived him of a federal right

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7 Aurora cites *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), in support of its position. In that case, a plurality of the court concluded that under *Younger* and its progeny, the federal district court should have abstained from deciding whether Texaco was entitled to injunctive relief under section 1983 against Pennzoil in the latter's attempt to execute a judgment after winning a civil jury verdict in a Texas trial court. .Since this was not a majority opinion, however, I believe that other cases the Court has decided provide surer footing in reaching a decision in this case.

8 Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

and, second, that the person who deprived him of that right acted under color of state law. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Monroe, supra*, 365 U.S. at 171. On summary judgment, the burden is on the movant to prove that he is entitled to judgment beyond a reasonable doubt. *Conaway v. Smith*, 853 F.2d 789, 792 (10th Cir. 1988), *citing Norton v. Liddel*, 620 F.2d 1375, 1381 (10th Cir. 1980).

There is no dispute that Aurora acted under color of state law in prosecuting Zaharia and Mittelstaedt under the Ordinances. The issue here is whether Aurora deprived them of rights under the federal constitution. Since Plaintiffs do not contend that the Ordinances themselves violate the federal constitution, resolution of this issue involves a two-part inquiry: whether, as Plaintiffs maintain, the Ordinances are pre-empted under state law, and, if so, whether prosecutions under their authority that resulted in acquittal in a court lacking subject matter jurisdiction give rise to a violation of either the Fourth or Fourteenth Amendment which is actionable under section 1983.

Because it is a home-rule city, Aurora maintains that it has the authority under the Colorado Constitution and state statute to enact ordinances and enforce them by providing for penalties for violations. It asserts that the Ordinances at issue here superseded state law and that the prosecutions of Plaintiffs pursuant to them were lawful. In response, Plaintiffs contend that under the court's ruling in *Aurora v. Green*, 86-CR-20 (D. Colo. Apr. 28, 1986), the Ordinances are void and unenforceable and that the Aurora Court cannot exercise jurisdiction over matters arising from alleged violations of such ordinances. They also assert that the Aurora Court lacks subject matter jurisdiction because the Ordinances are void as overbroad and *ultra vires* under Article XX, section 6 of the Colorado Constitution.

Plaintiffs' reliance on *Aurora v. Green* is misplaced. In *Green*, Aurora charged an U.S. Postal Service employee with violations of Code sections 27-38 (battery) and 27-40 (false imprisonment), and the case was removed to federal district court because the defendant was accused of these violations as an officer of the U.S. Government acting under the color of office. Defendant moved to dismiss. The district court, relying on state law, granted the defendant's motion because, it held, the penalty provisions were unlawfully excessive. Thus, the court did not reach the issue presented here whether prosecution under such ordinances gave rise to section 1983 liability.

Even if the Aurora Court lacked subject matter jurisdiction because the municipal ordinances under which Zaharia and Mittelstaedt were prosecuted were pre-empted under state law–an issue this court need not and does not decide–Plaintiffs have not demonstrated that past prosecutions under the Ordinances that resulted in acquittal are actionable under section 1983 as violations of the Fourth and Fourteenth Amendments to the federal constitution. They rely upon a passage in *Powell v. Alabama*, 287 U.S. 45, 68 (1932):

> It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law.

Plaintiffs admit and the court agrees that this language was *dicta*. The sole issue before the court in *Powell* was whether the trial court's failure to appoint counsel deprived appellants of due process and equal protection under the Fourteenth Amendment. Plaintiffs have not cited — and the court has not found — authority to support their position in

this case. I conclude that such past prosecutions, even if based upon municipal ordinances that are pre-empted by state law, do not rise to the level of constitutional dignity required for a section 1983 liability.

The April 12, 1990 Stipulation, *inter alia*, relieved Defendants Springer and the Aurora Court from active participation in this lawsuit and provided that they would be bound by the orders of this court. Since the court is entering summary judgment in favor of Aurora, it will dismiss the complaint with prejudice as against the other Defendants under the same rationale. In addition, because it is unnecessary to reach the question whether the Ordinances are pre-empted by state law to resolve the matter before me, Plaintiffs' request that the court certify the question to the Colorado Supreme Court under Rule 21.1, Colo. App. R., is denied. Because the court grants summary judgment against Plaintiffs, Plaintiffs' request that the court certify this case as a class action under Rule 23, Fed. R. Civ. P., is moot and is therefore denied.

Accordingly,

IT IS ORDERED THAT:

1. Defendant Aurora's Motion for Summary Judgment as to Plaintiffs' claim be, and hereby is, GRANTED; therefore, as to Defendant Aurora, it is ordered that the Complaint be, and hereby is, DISMISSED WITH PREJUDICE;

2. Plaintiffs' Motion for Summary Judgment as to their claim be, and hereby, is DENIED;

3. Plaintiffs' request that this case be certified as a class action under Rule 23, Fed. R. Civ. P., is moot and is therefore DENIED;

4. Plaintiffs' request that the court certify to the Colorado Supreme Court the question whether the Ordinances are pre-empted by state law be, and hereby is, DENIED;

5. Inasmuch as the court grants summary judgment in favor of Aurora, Plaintiffs' Complaint against Defendants Springer and Aurora Court be, and hereby is, DISMISSED WITH PREJUDICE;

6. Costs shall be assessed to Plaintiffs upon Defendant Aurora's filing of a bill of costs as provided by law. Under 42 U.S.C. 5 1988, the court, exercising its discretion, will not award attorney's fees as part of Defendant's costs;

7. Defendants' Motion for attorney fees pursuant to Rule 11, Fed. R. Civ. P., filed March 30, 1990, on which a ruling was reserved, be, and hereby is, DENIED;

8. The Clerk enter final judgment in this civil action in accordance with this Memorandum Opinion and Order.

DATED at Denver Colorado this 17th day of July, 1990.

BY THE COURT:

s/ Alfred A. Arraj
ALFRED A. ARRAJ, Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. **90-A-277**

RONALD HENRY ZAHARIA, TERRY LEE MITTELSTAEDT, and all those similarly situated,

Plaintiffs,

v.

THE MUNICIPAL COURT, CITY OF AURORA, COLORADO, THE HONORABLE JOHN L. SPRINGER, one of its judges, and THE CITY OF AURORA, COLORADO, a Colorado Municipal Corporation organized as a Home Rule Municipality under Article XX of the Colorado Constitution,

Defendants.

JUDGMENT

Pursuant to and in accordance with the Memorandum Opinion and Order signed by Judge Alfred A. Arraj and filed on July 17, 1990, it is

ORDERED AS FOLLOWS:

1. Defendant Aurora's Motion for Summary Judgment is Granted and the complaint and action be, and the same hereby are, dismissed as to Defendant City of Aurora, Colorado.

2. Plaintiffs' Motion for Summary Judgment is Denied.

3. Plaintiffs' request that this case be certified as a class action under Rule 23, Fed. R. Civ. P., is moot and is therefore Denied.

4. Plaintiffs' request that the Court certify to the Colorado Supreme Court the question whether the Ordinances are pre-empted by state law be, and hereby is, Denied.

5. Inasmuch as Aurora's Motion for Summary Judgment is granted, Plaintiffs' complaint against Defendants The Honorable John L. Springer and The Municipal Court, City of Aurora, Colorado, is dismissed with prejudice.

6. Costs shall be assessed to Plaintiffs upon Defendant Aurora's filing a bill of Costs with the Clerk of this court within 10 days from the date of this Judgment. Under 42 U.S.C. § 1988, the Court, exercising its discretion, will not award attorney's fees as part of Defendant's costs.

7. Defendants' Motion for attorney fees pursuant to Rule 11, Fed. R. Civ. P., filed March 30, 1990, on which a ruling was reserved, be, and the same hereby is, Denied.

DATED at Denver, Colorado, this 18th day of July, 1990.

For the Court:

s/ James R. Manspeaker
JAMES R. MANSPEAKER,
Clerk

APPROVED:

s/ Alfred A. Arraj
ALFRED A. ARRAJ, Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RONALD HENRY ZAHARIA, TERRY LEE MITTELSTAEDT and all those similarly situated, Plaintiff-Appellants, v. THE MUNICIPAL COURT, CITY OF AURORA, COLORADO, THE HONORABLE JOHN L. SPRINGER, one of its judges, and the CITY OF AURORA, COLORADO, a Colorado Municipal Corporation organized as a Home Rule Municipality under Article XX of the Colorado Constitution, Defendant-Appellees.	**No. 90-1232** (D.C.No.90-A-277) (D. Colo.)

ORDER AND JUDGMENT*

Before SEYMOUR, TACHA, Circuit Judges, and CHRISTENSEN, District Judge.**

Plaintiff Ronald Zaharia appeals the district court's grant of summary judgment in favor of defendant City of Aurora. We have carefully reviewed the record and have fully considered the arguments of plaintiff that he raised

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

** Honorable A. Sherman Christensen, Senior District Judge, United States District Court for the District of Utah, sitting by designation.

below. We have not considered those arguments raised for the first time on appeal. We are not persuaded that the district court erred in granting summary judgment for the City.

Accordingly, the judgment of the district court is AFFIRMED.

Entered for the Court

Stephanie K. Seymour
Circuit Judge

Judgment filed March 5, 1992

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RONALD HENRY ZAHARIA, TERRY LEE MITTELSTAEDT and all those similarly situated, Plaintiff-Appellants, v. THE MUNICIPAL COURT, CITY OF AURORA, COLORADO, THE HONORABLE JOHN L. SPRINGER, one of its judges, and the CITY OF AURORA, COLORADO, a Colorado Municipal Corporation organized as a Home Rule Municipality under Article XX of the Colorado Constitution, Defendant-Appellees.	**90-1232**

ORDER
Entered July 1, 1992

Before MCKAY, HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, Circuit Judges, and CHRISTENSEN*, District Judge.

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

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* Honorable A. Sherman Christensen, Senior District Judge, United States District Court for the District of Utah, sitting by designation.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

Robert L. Hoecker, Clerk

By: s/ Patrick Fisher
PATRICK FISHER
Chief Deputy Clerk